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HABITUAL CRIMINAL LEGISLATION.

The Supreme Court has recently, in a very elaborate opinion by Mr. Justice Hughes, gone into an extended review of the history, policy and constitutionality of laws providing for the inflicting of severer punishment upon habitual criminals. Graham v. West Virginia, 32 Sup. Ct. 583.

Justice Hughes says: "The propriety of inflicting severer punishment upon old offenders has long been recognized in this country and in England. They are not punished the second time for the earlier offense, but the repetition of criminal conduct aggravates their guilt, and justifies heavier penalties when they are again convicted. Statutes providing for such increased punishments were enacted in Virginia and New York as early as 1796, and in Massachusets in 1804; and there have been numerous acts of similar import in many states. This legislation has uniformly been sustained in the state courts."

The opinion also shows that this legislation by states was sustained by the federal Supreme Court in two cases. Moore v. Missouri, 159 U. S. 673; McDonald v. Massachusetts, 180 U. S. 311.

The latter of these two cases gives rise to reflections not wholly irrelevant to the agitation for the punishment of corporate officials by imprisonment, instead of fining, in effect, stockholders, for their criminal acts.

The increased punishment upheld in this case was adjudged under a statute making one twice convicted of crime and committed to prison in Massachusetts *or in any other state,* be deemed, upon conviction of a subsequent felony, an habitual criminal. The facts of the case were that two prior convictions and punishments were, one in Massachusetts and the other in New Hampshire.

What Mr. Justice Gray said in sustaining the increased punishment shows also the contention against its legality. He said: "The fundamental mistake of the plaintiff in error is his assumption that the judgment below imposes an additional punishment on crimes for which he had already been convicted and punished in Massachusetts and in New Hampshire. But it does no such thing. * * * The punishment is for the new crime only, but is the heavier if he is an habitual criminal. * * * The allegation of previous convictions is not a distinct charge of crimes, but is necessary to bring the case within the statute and goes to the punishment only."

Here we have it, that it is within the power of the legislature to prescribe—within the bounds of reason at least—what shall constitute one an habitual criminal and when he comes under such description he may belong to a class upon whom severer punishment may be inflicted than upon offenders belonging to the ordinary class.

The opinion by Mr. Justice Hughes is also very instructive as to the alternative procedure that may be resorted to in the imposition of the increased punishment. The fact of prior conviction may appear on the trial of the later offense, through pertinent averment in the indictment or information, or this may be ignored until conviction for the later offense has been obtained, when by procedure under appropriate statute the increased punishment may be imposed. The Massachusetts statute made it the duty of the warden of the state prison to give information about prior convictions to the attorney or solicitor general.

The wholesome reach of statutes of this kind should be appreciated in this country from many points of view. In the first place, the principle greatly may be utilized with respect to immigrants, not only the national government, but states also, embodying it in legislation.

We perceive no difference in a state making conviction and punishment in another state court a prior conviction and convic-

tion and punishment in a foreign country be the same thing.

Therefore, when an anarchist begins to mouth his seditious doctrines in this land of constitutional liberty, his criminal record or records in the land or lands of his prior activity may be looked up and be made to serve in effectually accomplishing his civil death. Perhaps also such laws may make his eyes turn to another place of refuge than under our skies.

But as between the states, and as between the states and the national government this principle in legislation opens up the widest possibilities of advantage. It has the potency of correlation and elimination of all supposed "twilight zone" as to offences, which intent contemplates shall occur as often as the occasion for their commission may present itself.

There never was a railroad director guilty of a single infraction of a regulation in interstate commerce who was not also guilty of innumerable offenses. His intent is always for wholesale crime. It is his unblushing life.

If state law and national law may cooperate so as to make him, in the courts of each, an habitual criminal, the question of corporate violation, so-called, will receive a check not yet administered. We would also suggest that for this co-operation to be more practicable, the distinction in the Massachusetts law ought not to be followed. That requires prior conviction and imprisonment. To make it conviction and punishment, or merely conviction unpardoned, ought to be sufficient.

Furthermore, this kind of statute would enjoy more complete certainty of effective enforcement than in 1796 and 1804. In those times a convict could extend his depredations, after release, to new neighborhoods with small apprehension of identification with his former offenses. Now, no matter how obscure or prominent he or his offense, the claim of identification may reach out its tentacles and show indubitably its right of seizure. Photography, the Bertillon system, thumb prints and the recorded voice may follow him, if justice needs them, to every nook and cranny of the habitable globe.

What, however, particularly commends to us this statute is, as we have tried to point out, the aid it affords in protection against the criminals of other countries, and the spirit of co-operation it invites in our complex system of government. There are many rubs this system produces and wherever in upholding law and order a principle may furnish a prop in the general plan, it ought to be welcomed and utilized.

NOTES OF IMPORTANT DECISIONS

GARNISHMENT—CONTENTS OF SAFETY DEPOSIT BOX.—The Supreme Court of Rhode Island in quite an elaborate opinion reaches the conclusion that a safe deposit company is subject to garnishment under the Rhode Island statute as to contents of a box, which it receives, in ordinary course of business, though it neither knows nor is expected to know what those contents are and to which the renter of the box alone has the key. Tillinghast v. Johnson, 82 Atl. 788.

It must be confessed that the opinion cites much apposite authority—indeed authority on all fours—for its conclusion, but, for ourselves, respectfully it is said, the authority is not at all convincing, though statute may be as broad on the subject of possession in the garnishee as may be asked. It seems to us that in law, possession has never passed from the owner or renter.

Quoting from Washington, etc., Co. v. Susquehanna Coal Co., 26 App. D. C. 149, which the principal case approves and where the situation is as strongly expressed as may be wished, we find it saying: "Property of a defendant in a safe deposit box of a trust company is either in the possession of the defendant or in the possession of the trust company. If it is in the possession of the defendant under the code, it appears liable to attachment and execution. If in the possession of the trust company, such company may be garnished therefor. * * * A mere device to guard from the intrusion the defendant's property in the vault of the trust company neither divests the defendant of his property nor re-

leases the company from its charge of defendant's property. There is no magic in two keys, a master key and a customer's key, to put property belonging to a defendant in an attachment beyond the reach of creditors and the process of the courts. If there were a doubt respecting the term "possession," there can be no doubt that property deposited by a defendant in a safe deposit box of a trust company is the defendant's property in the hands of and in charge of the trust company; and by the terms of the code the trust company is liable to be garnished therefor."

There is much in the above in the way of taking for granted the real question at issue, and it may not be greatly important whether attachment or garnishment is the proper remedy, as, if the property may be reached by one or the other, that is only the essential thing.

But it seems to us there is no possession in the trust company and it is not in charge of property which it knows nothing about and can ascertain nothing and which it may not move or handle. Its obligation is not to allow anything or anybody into the premises that may endanger the property remaining where it is, and to give to its renter of certain space an easement eundo et redeundo. The renter occupies a space, exclusively, greatly like that where a vendor sells a parcel in the middle of his field. If additionally the vendor contracts to guard vendee against "damage feasant," we apprehend that what vendee places on the land would not be in the possession of the vendor.

Besides all of this, the business of renting space in the midst of safe surroundings is a legitimate business and its proprietor should be no more deemed to have possession of the effects of his tenant than should any ordinary landlord.

But as we have said the principal case has much authority in its support. e. g. see Lockwood v. Manhattan Co., 50 N. Y. Supp. 974, 28 App. Div. 68; National Safe Deposit Co. v. Stead, 250 Ill. 584, 95 N. E. 973; Trowbridge v. Spinning, 23 Wash. 48, 62 Pac. 125, 54 L. R. A. 204, 83 Am. St. Rep. 806. It also cites some sealed package cases which hardly seem to cover the question.

NATURALIZATION — RETROSPECTIVE LEGISLATION AUTHORIZING THE SETTING ASIDE OF CERTIFICATES OF NATURALIZATION.—The language of sport seems so much in favor in high place of late, that possibly we may be pardoned for remarking that Mr. Justice Pitney in his new field of duties comes to the bat like a veteran in a major league. Having this out of our system, we call attention to the second of the two opinions he has rendered as clearly showing why a judgment admitting to citizenship may be assailed for fraud by procedure under a statute enacted long after the rendition of that judgment. Johannessen v. U. S., 32 Sup. Ct. 613.

The learned justice says: "The act does not purport to deprive a litigant of the fruits of a successful controversy in the courts, for the proceedings for naturalization are not in any sense adversary proceedings, but are ex parte and conducted by the applicant for his own benefit. The act in effect provides for a new form of judicial review of a question that is in form, but not in substance, concluded by the previous records, and under conditions affording to the party whose rights are brought into question full opportunity to be heard. Retrospective acts of this character have often been held not to be an assumption by the legislative department of judicial powers."

Indeed it may be greatly thought, from the general trend of the opinion, that a judgment of a court in such matters is more like an order of a board or a bureau than anything else, as the fact of citing cases touching judicial review of letters patent used as authority goes far to show.

Again there is a distinction pointed out between this statute and "legislation having the effect to deprive a citizen of his right to vote because of something in his past conduct which was not an offense at the time it was committed." The latter would be void as an ex post facto law, while the other provides a procedure for assailing a privilege that should not have been granted under the law as it existed when asked for on ex parte application.

It is interesting also to note at this time, that the court declining to say whether on general principles prior to the act, the government could have proceeded in equity to have a fraudulent certificate set aside, yet shows there were conflicting views in the lower federal courts on this subject.

If, as a fact, a judgment admitting to naturalization is not in its essence a judicial finding, the rule of its being in fieri while a term of court lasts might not apply, and if it does not, it would seem that a recent revocation, by a federal judge, of a certificate of naturalization had no effect, but procedure under the statute should have been resorted to.

THE JUDICIAL METHOD OF MAKING AND UNMAKING LAWS.

When a lawyer finds it necessary to take a position not supported by any precedent, or at least not by any case "on all fours" with the one in which he is retained, he bases his contentions upon established general principles, between which and the right which he asserts there seems to be more or less congruity. But he can never feel very confident that the court's decision will be in his favor unless he can point to a former decision, if not "on all fours," at least very similar to that for which he prays. The more decisions "on all fours" he can find, the greater will be his confidence in demanding judgment favorable to his client. For, in formulating law, the courts generally proceed by cautious gradations. This is their traditional method, and it is the method by which the vast body of the law has been enunciated. Like science, the common law, "moves but slowly, slowly, creeping on from point to point." This method is undoubtedly favorable to a sort of logical coherence. If we could begin with the earliest judicial decisions in modern England and follow along the legion of decisions which have since been rendered, reading them in the order of their pronouncement, we would probably find comparatively few that did not exhibit a state of facts similar to the facts involved in some preceding case or similar in the equitable principles involved to the principles which governed the decision in some preceding case. In the great majority of decisions we would find at least a professed congruity with a preceding decision or decisions.

There is doubtless a similarity between this process of legal development and the process by which moral ideas and sentiments are developed. Both involve discussion and controversy, and are marked by slow gradation; and it has sometimes been supposed that the judicial process of formulating law is better adapted to the maintenance of harmony between the prevalent ideas of justice and the legal system, than the legislative process. This would doubtless be true if courts in rendering their decisions were mere exponents of popular morality applying plebiscites previously taken upon the points involved in the cases. This, of course, is not their function. The taking of such plebiscites would be impracticable, and in the highest degree mischievous. The function of the courts is to apply their own judgment and sense of justice to the points presented for their decision, save in those rare cases where their own judgment and sense of justice may be controlled by previous decisions. The courts are not supposed to inquire what is or might be the popular opinion for the purpose of being controlled by it. The public are not informed, and in the nature of things can never have an intelligent opinion as to the moral and legal questions involved in all the vast number of cases which come before the courts. Judges and lawyers are to a certain degree, specialists. The vast majority of the cases with which they deal attract no general public attention. This is sometimes true of cases in which broad principles of constitutional law are involved, and which become precedents determining the subsequent drift of the law upon questions of personal liberty or legislative power, or upon both these questions. The silent advance of the law upon these great questions may be and sometimes undoubtedly has been in opposition to what would have been the public sentiment had the principles involved been discussed as political issues, and been thoroughly understood by the people.

But this silent advance of the law as formulated by the courts becomes dangerous only when it is made the basis for a bolder method of formulating judicial decisions in opposition to public senti-

ment; and when the decisions thus formulated are protected against legislative correction by a written constitution which cannot be amended save by a process which enables a small minority to defeat its amendment altogether. A situation of this kind must be regarded as full of peril; for it must result either in the destruction of popular government through the subjection of the majority by the minority, or in a civil war for the purpose of rectifying the abuse which should be cured by legislators elected as representing the will of the majority of the people. This remedial power has been regarded as one of the chief functions of legislatures ever since legislatures were established, and its importance is emphasized when the superior power of the courts is used to thwart the popular will, and not merely the will of a legislature expressed in some act which did not represent the matured popular opinion.

The scope of legislative power and the great and fundamental questions of the scope of individual liberty are government and of social well-being, and to make the decisions of a single court final upon these questions is to invite disaster. When these great questions are involved in a legal decision, the issue is more important than that which is paramount in an ordinary political election, and it is of the utmost importance that those upon whom devolves the duty of determining the issue act in strict accordance with their conscientious convictions. No doubt, such has been the practice of the eminent judges who have constituted the Supreme Court of the United States. Save in a very few cases, they have never been suspected of deviating from this rule. They are expected to deliberate, to discriminate, and to take sufficient time to arrive at an intelligent, logical decision and then hold to a firm adherence to their judgments. But no such incentive supports the lawyers who come before them to argue great issues. A lawyer is expected to fight for his client, and it is often said of eminent lawyers, that they fight harder when the law is against them than when they are conscious of its support. To be classed as a fighter of this character is to attract clients, and the greater one's reputation for winning hard cases, the more likely is he to be sought for by rich men who are conscious that their cases are hard. The great corporation seeking to have an act of congress annulled or limited in its application goes to the lawyer who for a sufficient retainer will give to the corporation the benefit of all his knowledge, skill and boldness in the argument of causes, and who is reputed to possess such knowledge, skill and boldness in the highest degree.

To attack an act of Congress or of a state legislature as void, should always be regarded as a serious undertaking, but when the act represents the matured and deliberate expression of popular opinion, to attack it is very much like attacking the principle of popular government itself. To do this in behalf of aggregated wealth and for a monetary consideration would be regarded as odious had it not long been sanctioned by a custom which covers with the veneer of respectability almost any conduct which can be classed as "professional" by men who thrive by virtue of their skill in making "the worse side appear the better." This custom and the boldness which it inspires in the corporation lawyer and unscrupulous corporation officials cannot fail to have its influence upon the judges of the court, especially upon those judges who sincerely distrust universal or manhood suffrage as the basis for government. When rich men can without odium hire able lawyers to render abortive the deliberate action of a majority of electors in a political election, there is danger that the rich man, the able lawyer and the conservative judge, made bold by the

esteem in which they are held by their associates, will proceed in their work, until between those who believe in popular government and those who do not believe in it there broadens a gulf which can only be bridged by war.

No doubt the action of the courts in annulling hasty legislation has often been truly conservative and has had the support of the most enlightened public sentiment. It is only when that action takes the form of persistent opposition to matured popular opinion that it becomes dangerous, and even then it would not be dangerous did not the federal constitution enable it by the support of a small minority, to be permanently successful in defeating popular demands. It is in the finality of the court's judgment that the danger lies. The legislature of a state may pass an act, it may be duly signed by the governor, it may be taken to the supreme court of the state and declared unconstitutional; the people of the state then deliberately amend the state constitution so that the act may be authorized, and the legislature again enacts it. The state supreme court then declares it constitutional, but at the instance of a private individual, or a corporation, speaking through an attorney, the federal court declares it void. So with a law of congress responsive to a pronounced popular demand, a demand it may be for a graduated income tax; such a demand is supported by a political party and made the chief issue in a national election; it may receive the support of the vast majority of the electors, after being discussed most thoroughly for months, and perhaps for years, by all classes of people in the United States; it may be recognized and treated as a question of transcendant importance, it may be debated in congress for weeks after being formulated into a bill; and after all this discussion and consideration, a consideration more careful and exhaustive than is usually given to the most important articles in a state constitution, after it has been passed by congress, signed by the president, and greeted with satisfaction by the press of the country, a lawyer is hired by some corporation to go before the supreme court and ask for its annulment, and although four of the judges may vote to sustain the act, it becomes a nullity if five vote against it.

This must surely be regarded as a most extraordinary anomaly in a democratic country, and the fact that reputable lawyers think it no disgrace, but rather a badge of distinction to be engaged in such work for a monetary consideration, shows how little the intrinsic moral character of an act is regarded when it is clothed with a conventional respectability. What would be thought of an attorney who would undertake to interview the King of England for the purpose of vetoing a law obnoxious to some rich corporation? Would he not be scorned as little better than a traitor? And if he had accepted money for such a service would the money not be regarded as in the nature of a bribe? But the British constitution gives the king the power to withhold his assent to a bill, and if he still has the technical right to follow the example of his predecessors, who actually exercised the right, has he not also the technical right to advise with counsel in the matter? What then is the distinction between the conduct of one offering such advice at the instance of a subject, and that of the American lawyer who seeks the annulment of an act in open court? It is merely a distinction without a difference.

But how great is the effect of custom has been shown in the acts which culminated in the American Civil War. Those among whom slavery existed as a custom could not easily feel any moral revulsion in contemplating the act of holding property in human beings; yet those who framed the constitution looked forward to the time when congress might

abolish slavery, or at least prohibit the importation of slaves into free territory. And a people whose declaration of independence had asserted the equality of all men before the law very naturally inquired why the principles of that instrument should not apply to *all men*, or at least to all men within the territory where it was recognized as enunciating principles binding upon the governments established in such territory. Thus between those who felt a moral repugnance to slavery, and felt that it was inconsistent with the declaration of independence, and those who had no such feelings, a controversy sprang up which was partially and temporarily settled by the Missouri Compromise.

But in the meantime, another custom had grown up in the country where slavery was established, the custom namely of looking to the supreme court as clothed with the power of annulling acts of Congress. Thomas Jefferson had denounced this power as usurpation, and as containing the germs of national dissolution, but it continued to be exercised and it was defended and advocated by Daniel Webster, the great opponent of the doctrine of state sovereignty; and thus the people of the North quite as much as the people of the South formed the custom of regarding as legitimate, the power which Jefferson had denounced as usurpation. It is difficult justly to appraise the influence of this custom, but that it was immense there can be no doubt; and when, in the Dred Scott case, it was exercised to annul an act of congress which had been recognized and had operated as law for thirty-six years, its effect in confirming the sentiment for slavery in the minds of those who desired to perpetuate it must have been very great. Their determination to maintain and to extend slavery must have been greatly strengthened by the support they received from a tribunal having such great authority. Would the South ever have attempted secession if the supreme court had never asserted this power of annulment? Certainly there are good grounds for believing that the pro-slavery sentiment would never have gathered the force it did if the people had formed the habit of looking upon acts of congress as necessarily legal.

What might have been the course of English history had British sovereigns since the revolution increased their practice of vetoing bills until it became an established custom acquiesced in by the people?

The considerations which may determine a decision in an ordinary case are very often of almost equal weight, and the public have very little interest in the matter. Save to the parties litigating, it is not important which view of the law prevails. There is no broad distinction between the opposing views, and one may as fitly as another become a rule of property, a rule of procedure, or even a rule of criminal law, so far as future transactions are concerned. But the issue is entirely different where a great public measure demanded by the people, and enacted as a law by the representatives of the people is attacked. The issue then, is between the public and an individual; it has already been decided by a majority of the people and by their representatives and the litigant attacking their decision has no more interest in the judgment to be rendered by the court, than any other member of the community, or at least than any other member who thinks as he does and whose pecuniary interests may be affected in the same way.

It may be urged, however, that a legislative enactment involving constitutional considerations is never decided until it has passed under the review of the supreme court; that the supreme court is the tribunal which the people themselves have established for the determination of constitutional questions, and hence any decision which they may come

to regarding the expediency or necessity of a law must be regarded as made with the conscious proviso that it may be set aside if the supreme court finds that the law so made upon their recommendation is unconstitutional; that the lawyer, therefore, who goes before the supreme court to attack an act is but performing a function prescribed by the people themselves, a function of the highest responsibility and therefore of the highest honor; that logical thoroughness in presenting the constitutional questions to the court is what the people expect of him, and that if he fulfills their expectations in this regard, he is entitled to their commendation, even, although the result of his logical thoroughness is that the supreme court annuls the act passed pursuant to a persistent popular demand. This argument might pass as valid and as justifying the conduct of a lawyer in attacking the constitutionality of such an act, if it were true that in so doing he is but "performing a function prescribed by the people themselves, and that the supreme court was ordained for the very purpose of reviewing the conclusions of matured popular opinion, and that such conclusions must therefore be regarded as made with the proviso that they may be held for naught if the supreme court finds them inconsistent with constitutional principles. But this is both untrue and absurd. If it were true it would mean practically that the supreme court had been invested with the power of declaring invalid any amendments which the people might make to the constitution itself. It would mean more than this. It would mean that the people of the eighteenth century had the power to bind the people of the twentieth century to any decisions of the supreme court, however despotic these decisions might be, unless the people of the twentieth century were able to amend the constitution made by those of the eighteenth in exact accordance with the mode prescribed by the latter.

The lawyer who attacks an act embodying the matured views of the governing majority on the ground that it does not square with the constitution made in the eighteenth century, must be regarded as desiring to subordinate the constitutional views of the people of his own day to the views of their remote ancestors. Questions which become the subject of sectional or class controversy, questions such as those which brought on the Civil War, cannot be settled in the mode prescribed for amending the federal constitution, and the lawyers and the judges who persistently oppose an ancient constitution to the matured constitutional views of a majority acting through their representatives, must expect to be treated by that majority as public enemies. When their opposition is honest and made in the sincere belief that they are discharging a duty and serving the ends of justice by curbing the will of the majority, they are entitled to the respect which sincerity always deserves, but their sincerity cannot alter the fact that their persistent opposition may become dangerous to national peace. When, however, a lawyer's attitude to grave questions by which public feeling has been wrought to the highest pitch, is merely mercenary when he sells his power to block popular demands to a corporation and expects that logical thoroughness in arguing against an act that embodies popular demands, will win him professional honors the bar ought to see to it that his expectations are disappointed.

In times past, when popular rights were endangered by the tyranny of governments, the leading lawyers of England and America have for the most part been supporters of the people, and when necessary, have willingly sacrificed their lives for the cause of liberty; and it would surely be an everlasting disgrace to the profession, if its leading members, in these days of great material prosperity should be seduced by the dross of wealth, to forsake the cause of humanity and progress. If the leaders of a profession which controls the admin-

of electors when they go to the polls is

istration of justice exalt the spirit of commercialism above that of righteousness, they need not be surprised if the people, in the distrust which commercialism and dishonesty breed, demand changes which will wipe out or transform the profession of law, or introduce an era of agitation, tumult, war and anarchy.

Questions fundamental in their bearing upon individual liberty and property, upon the relations among workers, and the relations between the workers and the owners of the materials whereby work is carried on; questions which for many years have been discussed in the college and the university, in magazines and in works of political and economic science are by degrees being made the subject of practical legislation, and if those who believe that the progress and happiness of mankind depend upon the gradual adoption of changes at which that legislation aims, find that it is not enough to win over the majority to their way of thinking by the power of thought and discussion; but that after majorities have been won, and have expressed themselves at the polls and through their legislative representatives, the result of thought and discussion and legislation is rendered abortive by a profession imbued with the spirit of commercialism, that spirit or the usefulness of the profession will decline.

It is, of course, true that majorities may often be in error in attempting to cure evils by legislation, and when they succeed after years of strenuous agitation in obtaining the desired legislation, it proves disappointing, and those who obtained it soon demand its repeal. But this is as often true of constitutional as of unconstitutional legislation, and even although some measures which are fiercely contested as political issues should prove failures as remedies for the evils at which they aimed, for a court to pronounce them void in advance of experiment is inconsistent with popular government. Under popular government, freedom of discussion and a constant appeal to conscience and reason are the safe and consistent modes for making and unmaking laws involving popular demands. The question whether a law will or will not prove just or expedient is of its very essence. On this point the majority demanding it may be wrong, but the supreme court may also be wrong, and the consistent democratic method is to permit the majority to experiment and to repeal the law if it prove disappointing instead of annulling it at the instance of an individual or a corporation by appealing to the supreme court.

No doubt, when the majority act through secret unions and secret organizations, their action may often be exceedingly unjust and oppressive to individuals, but here too, freedom of discussion and an appeal to conscience and reason are indispensable as preliminary to the application of a remedy, for a remedy cannot be applied until a disease is properly diagnosed.

It need hardly be said in conclusion, that for making and unmaking laws the judicial method is admirable when supplemented by the legislative method. This has been recognized for ages. The legal system of a nation may be compared to an apple tree. If allowed to grow without pruning, it becomes dense, and weighted with brush and wood, many limbs become overtopped and shaded by others and yet occasionally produce fruit, but of an inferior and unwholesome quality. Sometimes all the branches of the tree are attached to two huge limbs which grow from the trunk in opposite directions. By degrees, the weight accumulating upon these two opposite limbs rends the trunk apart and the tree is destroyed. The shady limbs are the anomalous and inconsistent decisions; the two huge limbs are as two great opposing principles, like the police power and individual liberty. A vigilant, honest and intelligent people will keep their legal system pruned so that it may become as the tree "near planted by a river, which in its season bears its fruit and its leaf fadeth never."

W. A. COUTTS.

Sault Ste. Marie, Mich.

SHERIFFS AND CONSTABLES—ACTS COLORE OFFICII.

MAYOR AND ALDERMEN OF JERSEY CITY et al. v. SCHOPPE et al.

Court of Errors and Appeals of New Jersey, March 4, 1912.

82 Atl. 913.

(*Syllabus by the Court.*)

Where a constable was directed by a writ of attachment to attach the goods of the defendant named therein, and accepted from defendant the amount of the plaintiff's claim and costs, and paid the same to the plaintiff's attorneys, and thereafter the defendant in the writ succeeded upon the trial of the action, and the constable failed to return to him the money deposited, held, in a suit upon the constable's bond for a forfeiture thereof, that the acts of the constable were not performed in furtherance of his duty, as prescribed by law, but were performed by him unofficially or colore officii and as such could not subject his sureties to liability on the bond.

Error to Circuit Court, Hudson County.

Action by the Mayor and Aldermen of Jersey City and others against George J. Schoppe and others. Judgment for defendants, and plaintiffs bring error. Affirmed.

Pierre Cook, for plaintiffs in error. Marshall Van Winkle, for defendants in error.

MINTURN, J.: While about to sail for Europe from Hoboken, the baggage of Stewart H. Elliott was attached by Constable George J. Schoppe on a writ of attachment issued out of the First district court of Jersey City, at the suit of one Wallace H. Owen. When the object of the constable's writ was announced, Elliott protested the correctness of the claim, but finally paid the amount with costs of suit to the constable, who gave Elliott a receipt and thereupon released the goods. Instead of paying the money into court, the constable turned it over to the attorney for the plaintiff in the writ, who gave him a receipt for it, and, upon the same day, the constable returned the writ into court indorsed fully satisfied. Elliott entered his appearance to the suit in due course, and a trial took place which resulted in a judgment in his favor. He then instituted this suit through the municipality, as the obligee named in the constable's bond, to have the same declared forfeited against the constable and his sureties. The insistment made is that the payment of the money by the constable to the plaintiff's attorneys, instead of turning it into court, was a breach of the condition of the bond, and legally worked its forfeiture. The Hudson circuit court, sitting without a jury, resolved this contention against the plaintiff, and the legality of that adjudication is before us for review upon writ of error.

The constable's bond to the municipality contained the usual condition that, "if the said George J. Schoppe shall well and truly perform the duties of his said office of constable of Jersey City, then the above obligation to be void," etc.

The seventy-first section of the District Court Act (2 Comp. St. 1910, p. 1978) provides that the defendant in attachment may secure the release of the goods attached by giving bond "in double the value of the property attached conditioned for the return of the goods in case judgment shall go against him."

The eighteenth section of the act provides that, instead of furnishing a bond, he "may deposit a sum of money equal to the bond or recognizance which sum shall be paid to the clerk of the court," etc.

It is the conspicuous fact in this case that, instead of complying with either of these alternatives, the defendant in the writ paid to the constable the exact amount of the plaintiff's demand with costs. It will be observed, therefore, that, in accepting and receipting for this sum, the constable was not acting virtute officii, but unofficially, and not in the due execution of the writ. The act prescribes the limitations of his duty, and the condition of the bond is limited to the faithful performance of such duty. The act performed by him, therefore, in accepting payment or satisfaction of the claim, was performed colore officii and clearly not virtute officii.

Liability of sureties upon a bond of this character, it may be said in passing, can attach only as a matter strictissimi juris, and so it has been held that "sureties for an officer are liable only in the event of his failure to perform his duty. If in the line of his duty he make a contract as agent for another, his sureties are not liable for the breach of that contract, as the contract is not the officer's. Brown v. Phipps, 14 Miss. 51; Com. v. Swope, 45 Pa. 535, 84 Am. Dec. 518; Parks v. Ross, 11 How. 362, 13 L. Ed. 730.

These considerations have presented the test of liability in this state since the adjudication by the Supreme Court in 1860 of State v. Conover, 28 N. J. Law, 228, 78 Am. Dec. 54. In that case Chief Justice Green, speaking for the court, referring to liability for acts done colore officii, or of an unofficial character, said: "In such case the officer is guilty of a tort, for which he is liable as an individual to the party

injured, but it does not entitle the party to prosecute the officer on his bond." Mr. Justice Haines, in the same case, defined acts done colore officii as "unofficial acts committed under color of the office, such as cannot lawfully be done and cannot be justified by the official character of the sheriff, or by any process in his hands," citing Seeley v. Birdsall, 15 Johns. (N. Y.) 267; Alerck v. Andrews, 2 Esp. 540; People v. Schuyler, 4 Comst. 187.

Since its deliverance this adjudication has stood unquestioned in this state, and, although not followed by the Federal Supreme Court in Lammon v. Feusier, 111 U. S. 17, 4 Sup. Ct. 286, 28 L. Ed. 337, it has quite properly been followed by the trial court in this instance, and has furnished ratio decidendi for its determination.

Having served as a precedent for over one-half a century of our legal history, unquestioned by our courts, and unassailed by criticism, we are not disposed at this period, upon mere disputable considerations of abstract reasoning and expediency, to question its legal accuracy.

The judgment under review will therefore be affirmed.

NOTE.—*Responsibility of Sureties for Acts Done Colore Officii.*—The principal case has little company in American decision as the case of Lammon v. Feusier, 111 U. S. 17, which it cites, shows. The Lammon case showed that a few states agreed with New Jersey ruling but New York, cited by principal case, was not one of these except in early holdings in lower courts reversed by the Court of Appeals in People v. Schuyler, 4 N. Y. 173, which case was deemed as settling the law in New York, as see Cumming v. Brown, 43 N. Y. 514; People v. Lucas, 93 N. Y. 585.

One of the states formerly holding as the principal case holds has receded therefrom under a statute making sureties "liable to the person injured for all acts done by said officer by virtue and under color of his office." Warren v. Boyd, 120 N. C. 56, 26 S. E. 700.

In Alabama a similar statute was held not to cover the case of a sheriff erroneously determining the value of the property in fixing the penalty of the forthcoming bond, because it was said "these acts are judicial in their nature and the officer is not liable to a civil action for his manner of the performance of them, even though he acts corruptly." Scott v. Ryan, 115 Ala. 587, 22 So. 584. It was said the purpose of the amended law "was to enlarge the liability of the officer and his sureties by extending it to acts which were before regarded by law as private individual torts of the officer, though done under color of his office—the existing liability at that time being only for official delinquencies."

The ruling in this case seems to be a kind of cheese-paring of the law—a reluctance to abandon an old rule the statute was designed to abolish.

Indiana was said to be one of the states giving some support to such a ruling as that in the principal case, but this may be merely that some acts were not in its courts considered as being done *colore officii* which elsewhere might have been thus considered. Thus it was held, that a sheriff sending out a photograph and description of a person committed to his charge was held not to be an act either *virtute officii* or *colore officii*. State v. Clausmeier, 154 Ind. 599, 57 N. E. 541, 50 L. R. A. 73.

In a later case in that state it was held that a sheriff negligently permitting a prisoner to be taken from jail and killed, is liable upon his official bond. Ex parte Jenkins, 25 Ind. App. 532, 58 N. E. 560, 81 Am. St. Rep. 114.

It also has been ruled that acts under a void writ are not acts *colore officii* and no responsibility therefor attaches to a bond. M. S. Lendon v. State, etc. (Tenn.), 2 L. R. A. 738. See also State v. Timmons, 90 Md. 10, 44 Atl. 1003, 78 Am. St. Rep. 417.

Missouri seems the other way. Thus where a constable levied under a mere memorandum for costs, believing it was equivalent to an execution. State v. Edmundson, 71 Mo. App. 172.

Goode. J., in a later Missouri decision, states the matter thus: "A distinction which formerly enjoyed a wider vogue than it does now is taken between the acts of a sheriff or other executive officer done by virtue of his office or *virtute officii*, and acts under color of his office or *colore officii*; and there have been many decisions that the officer's sureties are responsible for acts of the first sort when they are illegal, but not for those of the second sort. This distinction is subtle and having proven barren of wholesome results, as shown in recent well-considered judgments, it has given place to the rule that illegal acts done only *colore officii* make the bondsmen liable, if the illegality consists in an abuse of authority instead of an outright usurpation. Whether this doctrine is more tangible than the other or more likely to work satisfactorily, remains to be seen; and it may well be doubted whether an official's sureties ought not to answer for any of his misconduct under color of office, unless it is apparent he made a pretext of his authority to gratify personal malice or accomplish a personal end." State ex rel v. Dierker, 101 Mo. App. 636, 74 S. W. 153.

This case gives a number of other cases especially pointing out conflict in decision as to valid process being a *sine qua non* of surety liability.

An arrest under a void warrant was held in Texas to make the officer's bond liable. Roberts v. Brown, 43 Tex. Civ. App. 206, 74 S. W. 388.

A late Oklahoma case appears to follow the theory expressed by Goode, J., above, in holding that "where an officer, while doing an act, within the limits of his official authority, exercises such authority improperly, or exceeds his official powers or abuses an official discretion vested in him, he becomes liable on his official bond to the person injured. But where he acts without any process and without the authority of his office in doing such act, he is not considered an officer, but a personal trespasser." Inman v. Sherrill, 116 Pac. 426. This seems as good a formulation of the doctrine as could be made, except it does not speak definitely on the question of void process.

In Chandler v. Rutherford, 101 Fed. 774, 43 C. C. A. 218, Judge Thayer, of Eighth Circuit Court of Appeals, after first speaking of what was held in the Lammon case and saying that where an officer assumed to act under a void writ, no liability was imposed on his sureties, he says: "To constitute color of office such as will render an officer's sureties liable for his wrongful acts, something else must be shown besides the fact that in doing the act complained of the officer claimed to be acting in an official capacity." He must, says Judge Thayer, have a valid writ.

There is authority that color of office does not imply necessarily that an officer has a valid writ or even any writ at all. Thus it was held that a deputy sheriff falsely claiming to have a warrant for the arrest of a person not formally charged with crime, acts under color of office in arresting him, making the sureties on the sheriff's bond liable. Lee v. Charmley, N. D., 129 N. W. 448. The Lammon case is cited as supporting this conclusion.

In Greenberg v. People, 225 Ill. 174, 80 N. E. 100, 8 L. R. A. (N. S.) 1223, 116 Am. St. Rep. 127, sureties were held liable for an assault upon the wife of an execution debtor to prevent her assisting her husband in preparing his schedule of property levied on, out of which he was entitled to claim an exemption. In support were cited Turner v. Sisson, 137 Mass. 191; Clancy v. Kentworthy, 74 Iowa 740, 35 N. W. 427, 7 Am. St. Rep. 508; State v. Beckner, 132 Ind. 371, 31 N. E. 950, 32 Am. St. Rep. 257, and as opposed, State v. Dayton, 101 Md. 598, 61 Atl. 624.

It may fairly be said upon the whole, that tendency of decision is away from the principal case and even that old decision was more opposed to than in accord with it. The reasoning in the cases is not highly satisfactory or well formulated in any jurisdiction. Legislation, perhaps, might help matters out. C.

CORRESPONDENCE.

THE PUBLIC AND THE COURTS.

Recently, Hon. Elihu Root, in a speech before the New York Bar Association, deplored the growth of public criticism of the courts, and made the error of assuming that what he termed the public disrespect of the courts was attributable solely to a tendency of the people to criticise the decisions of the Federal Courts in Constitutional cases and the trust cases. This class of criticism forms a very small fraction of the feeling that the people have against the Judiciary, the Law, the Lawyers and the entire legal machinery. The average citizen is not interested in these technical questions that are far above his intellectual range, and his faith in the Federal Courts, and Courts of Appeal, is not impaired; what interests him, and what interests his pocketbook directly, is the quality of justice and the brand of protection which he and his business are going to obtain in the trial courts, with which he has to do, and in which he feels a close personal interest.

The fault is not with the judges; it is with the system that makes them judges. The politicians during the last few years, particularly, do not dare nominate other than eminently honorable men for the bench, but what does the public know of this; their only concern is that the judges are selected by politicians and must, therefore, be those who are entitled to political reward. There is the foundation on which present public criticism is based; there is the premise for public reasoning.

The reform of legal procedure is occupying the attention of the Bar Associations; it is a worthy occupation; there is lots of room for such reform, but it isn't going to remedy the real difficulty. Our present system of the Administration of Law is not all wrong merely because the public has certain ideas and some misconceptions of fact about the judges, but there can be no doubt that if judge-making is under a system that has grown to be clumsy and inefficient, and regarded with suspicion, which cause the courts to be distrusted, there is but little use in tinkering with the details of procedure; we must begin with essentials, and that means to separate the judiciary from politics; make the judges really independent and the proper procedure will follow.

Restoring the public's confidence in the Administration of Law by separating it from politics is not the only great benefit to be obtained; far more important is the freedom which will thus be given the judges. Sidney Brooks, the well-known English writer, observed that, "in every trial in New York it is the judge that is on trial, whilst the lawyers are engaged in trying to trap him in a reversible error." The result is that the judge is trying to avoid mistakes, partly perhaps because he must keep clear the record of his political office, and also because his position as a political office-holder does not tend to inspire that independence which should give the judge the direct control of the conduct of the case, and the power to present anything that interferes with its proper and just disposition, instead of being forced by one side or the other into acting as an umpire.

Let us for a moment compare our situation with that in the jurisdictions where politics and the judiciary are separated, at least sufficiently so for all practical purposes; much has been said and written of the example that England has set the world in the administration of the law; certainly, no student of the subject can question this, or that it is attributable directly to the fact that the judges are appointed from a select body of expert trial lawyers, whose qualifications are appreciated; the result is too well known to require discussion here. But we need not go to England to find that ideal situation; let us turn to the State of Connecticut, for an illustration: there the judges are appointed for six years; they are reappointed always during good behavior, regardless of politics; one hears and sees nothing but the highest respect for the courts, and such is the confidence in the judges that gradually it has developed that four-fifths of the cases are submitted to the courts, instead of juries. The public is satisfied; the recall is not discussed, nor does one hear that hackneyed phrase of the law's delays.

HENRY M. EARLE.

New York.

BOOKS RECEIVED.

Water Rights in the Western States, Vols. 1 and 2. By Samuel C. Wiel, of the San Francisco Bar. Revised and Enlarged to June 1, 1911. Third Edition. Price, $15.00. San Francisco, California. Bancroft-Whitney Co. Review will follow.

The Federal Employers' Liability and Safety Appliance Acts. Second Edition. With similar State Statutes and Federal Statutes on Hours of Labor. B. W. W. Thornton. Price, $——. Cincinnati, Ohio. The W. H. Anderson Co. Review will follow.

The Records of the Federal Convention of 1787 in three volumes. Edited by Max Farrand, Professor of History in Yale University. Price, $15.00 net for the three volumes. New Haven, Conn. Yale University Press. Review will follow.

The High Court of Parliament and its Supremacy. An Historical Essay on the Boundaries Between Legislation and Adjudication in England. By Charles Howard McIlwain. Price, $2.50. New Haven, Conn. Yale University Press. Review will follow.

BOOK REVIEWS.

STUDENTS' REMINGTON ON BANKRUPTCY.

This book in one volume is by Mr. Harold Remington of New York, the author of Remington on Bankruptcy, a book well-known to the profession.

The students' treatise is on the elementary principles of bankruptcy law, as to which, so far as the special needs of law students are concerned no work is extant. The larger treatise of the author is of too great proportions as a text book and also treats the law rather as a statute than as a system of jurisprudence, such as law students need.

The volume is attractive in style and print and would seem to fill a need in student use. It is published by the Michie Company, Law Publishers, Charlottesville, Va., 1911.

PUBLIC SERVICE COMMISSION REPORTS, FIRST DISTRICT, NEW YORK—VOL. 1.

This volume is a report of decisions upon the public service commissions law of the state of New York rendered by the commissioners of the First District, together with a copy of that law and the rules of practice and procedure adopted by said commissioners. The decisions are reported just as are those of a judicial tribunal with syllabi prepared by the secretary of the commission. Memoranda of cases decided are not embraced in volume I., but these are reserved for volume II.

The plan of opinions appears to be that one of the commissioners after regular hearing proposes an opinion which is adopted by the commission, the opinion being tentative in nature generally, but sometimes principles are set forth for guidance of public service companies.

The opinions in this volume cover the period between July 1, 1907, and September 1, 1909, but were not published heretofore. They are models of brevity, generally, consisting of statement of facts and conclusions upon matters of fact, with only occasional citations of authority.

This is a useful volume for practitioners before the commission, whose district comprises the city of New York and in showing how the New York statute is being practically applied. This volume contains nearly eight hundred pages, is bound in law buckram and is published by the commission; New York; 1912.

HUMOR OF THE LAW.

"I've listened to many divorce cases," said a Louisville judge, "but never have I heard such an all embracing appeal for separation as that Virginia darky gave before the county justice in Virginia."

"Why, Sally," said the justice, "what are you doing here?"

"Well, jedge, I wants a divorce."

"You want a divorce, Sally! Why, I thought Bill was a good nigger. Ain't he good to you?"

"Oh, ya-as, jedge; Bill ain't never hit me a lick in his life."

"Well, doesn't he support you?"

"Ya-as, sir, he give me 60 cents last Saddy night!"

"Well, what in the world is the matter with you then?"

"Jedge," said Sally, in confidential tones, "to tell de truf, I jes' los' my taste for Bill."

A story is told of an eminent lawyer receiving a severe reprimand from a witness whom he was trying to browbeat. It was an important issue, and in order to save his case from defeat it was necessary that the lawyer should impeach the witness. He endeavored to do it on the ground of age in the following manner:

"How old are you?" asked the lawyer.

"Seventy-two years," replied the witness.

"Your memory, of course, is not so brilliant and vivid as it was twenty years ago, is it?" asked the lawyer.

"I do not know but it is," answered the witness.

"State some circumstance which occurred, say, twelve years ago," said the lawyer, "and we shall be able to see how well you can remember."

"I appeal to your honor," said the witness, "if I am to be interrogated in this manner. It is insolent!"

"You had better answer the question," replied the judge.

"Yes, sir; state it," said the lawyer.

"Well, sir, if you compel me to do it I will. About twelve years ago you studied in Judge ——'s office, did you not?"

"Yes," answered the lawyer.

"Well, sir, I remember your father coming into my office and saying to me, 'Mr. D., my son is to be examined to-morrow, and I wish you would lend me $15 to buy him a suit of clothes. I remember also, sir, that from that day to this he has never paid me that sum. That, sir, I remember as though it were yesterday."—Woburn Journal.

WEEKLY DIGEST.

Weekly Digest of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of all the Federal Courts.

1. **Bankruptcy**—Exempt Occupation.—In determining whether one sought to be adjudged an involuntary bankrupt is chiefly engaged in the exempt occupation of farming, all his pursuits must be considered as a whole, though he is merely a partner as to some of them.—American Agricultural Chemical Co. v. Brinkley, C. C. A., 194 Fed. 411.

2.——General Assignment.—An assignment of a debtor's property held to constitute a general assignment for the benefit of creditors, and as such an act of bankruptcy, within the Bankruptcy Act.—Courtenay Mercantile Co. v. Finch, Van Slyck & McConville, C. C. A., 194 Fed. 368.

3.——Partnership.—Where an agreement that the accounts of a firm should be used to pay firm debts was not incorporated in a partnership dissolution agreement, an outgoing partner was not entitled to enforce such provision as against partnership creditors in bankruptcy.—In re Wilson, U. S. D. C., 194 Fed. 564.

4. **Banks and Banking**—Assumption of Liability.—Persons who assumed the liabilities of a national bank on its voluntary liquidation are liable on a breach of warranty occurring after the assumption of liability.—McLean v. Moore, Tex., 145 S. W. 1074.

5. **Bills and Notes**—Accommodation Indorser.—Defendant knowing that a note which he signed as maker was so signed to enable a bank president to use the bank's funds under the guise of a loan, he would be liable on the note as maker to the bank's receivers, and could not show that he was only an accommodation indorser, and was not to be bound.—Arthur v. Brown, S. C., 74 S. E. 652.

6.——Burden of Proof.—In an action on a note, a transferee, has the burden to show that he paid value, though the fraud relied upon by defendant arose after the making and first circulation of the note.—Boyce v. Bickford, Tex., 145 S. W. 1082.

7.——Negotiability.—A note, negotiable when made, is still a negotiable instrument after maturity, as between the original parties.—Beall v. Russell, 134 N. Y. Supp. 633.

8. **Bonds**—Coupons.—A coupon note, reciting that it is for six months' interest due on a certain date on a certain coupon bond, not being negotiable, the complaint in an action thereon must allege the issuance and delivery of the bond, and the lapse of time or other circumstance rendering the interest due.—Apple v. National Automatic Weighing Mach. Co., 134 N. Y. Supp. 582.

9. **Boundaries**—Deeds.—Where a deed is erroneous, both as to the acreage and boundary on one side, but the description concludes with a reference to the title under which the vendor holds, such reference will govern.—Ganuchean v. Mormot, La., 58 So. 150.

10. **Brokers**—Commissions.—Merely procuring an agreement from an agent of a purported lender that he would make a loan, though made within the time limit, does not entitle a broker to commissions, where the purported lender was out of the country and could not have performed.—Slawson & Hobbs v. Rafter, 134 N. Y. Supp. 585.

11. **Carriers of Goods**—Baggage.—A carrier transporting freight as baggage, without knowledge of the facts, is not liable for the loss of the freight, except through gross or willful negligence.—St. Louis, I. M. & S. Ry. Co. v. Miller, Ark., 145 S. W. 889.

12.——Overcharge.—At common law, where an exorbitant charge is coercively exacted by a carrier either in advance of or at the completion of the service, an action may be maintained to recover the overcharge.—Cullen v. Seaboard Air Line R. Co., Fla., 58 So. 182.

13. **Carriers of Passengers**—Pass.—One riding on a pass, not being a passenger, is bound by a condition therein releasing claims for injuries.—Malott v. Weston, Ind., 98 N. E. 127.

14. **Charities**—Torts.—A religious and charitable hospital is not exempt from liability for injuries to an employee.—Armendarez v. Hotel Dieu, Tex., 145 S. W. 1030.

15. **Commerce**—Carriers.—Carriers necessarily affected by an order of the Interstate Commerce Commission, although not parties thereto, may maintain a suit to enjoin its enforcement.—Atlantic Coast Line R. Co. v. Interstate Commerce Commission, U. S. Com. Ct., 194 Fed. 449.

16. **Conspiracy**—Overt Act.—As regards guilt of one or two persons acting in concert of an attempt to commit robbery, it is immaterial that the other commits the overt act constituting the attempt.—People v. Moran, Cal., 122 Pac. 969.

17. **Contracts**—Acceptance.—An acceptance before notice of withdrawal of an offer is received is effective from the date of mailing.—Malloy v. Drumheller, Wash., 122 Pac. 1005.

18.——Consideration.—A new contract to pay additional compensation for work which plain-

tiff was already obligated to do was without consideration.—Galway & Co. v. Prignano, 134 N. Y. Supp. 571.

19.——Letters and Telegrams.—Where a transaction and the authority of an agent in relation thereto consist entirely of writings, letters, and telegrams, it is a question of law whether they constitute a contract or show authority in the agent.—Atwood v. Rose, Okla., 122 Pac. 929.

20.——Public Policy.—Courts cannot arbitrarily declare a contract void as against public policy where the power to contract is given by statute.—Moon v. School City of South Bend, Ind., 98 N. E. 153.

21.——Recitals.—A recital in a contract that each party has paid to the other $1 imports no consideration.—Velie Motor Car Co. v. Kopmeier Motor Car Co., C. C. A., 194 Fed. 324.

22. **Corporations**—Agency.—The executive officer of a manufacturing corporation could not be presumed to have authority to contract with a broker for commissions for sale of the property occupied by it as a plant.—McCorry v. John C. Wiarda & Co., 134 N. Y. Supp. 667.

23.——Agency.—The general principles of the law of agency apply to private corporations and their officers.—Union Bank & Trust Co. v. Long Pole Lumber Co., W. Va., 74 S. E. 674.

24.——Liability of Stockholders.—On distribution of a corporation's assets among its stockholders, the stockholders become liable to the extent of the stock received by them.—McLean v. Moore, Tex., 145 S. W. 1074.

25. **Criminal Law**—Accessory.—An accessory cannot be guilty unless the principal is guilty, and cannot be guilty of another or higher grade of crime than that of which the principal is guilty.—Ray v. State, Ark., 145 S. W. 881.

26.——Intent.—Criminal intent forms no part or element of acts mala prohibita, and such acts are not excused by ignorance or mistake of fact.—People v. D'Antonio, 134 N. Y. Supp. 657.

27.——Jeopardy.—A partial trial under an insufficient indictment, quashed at the close of the state's evidence, held not to put accused in jeopardy.—Blocher v. State, Ind., 98 N. E. 159.

28. **Equity**—Forfeiture.—A court of equity has the same power to relieve from forfeitures provided for by statute as it has to relieve from those provided for by contract.—Donaldson v. Abraham, Wash., 122 Pac. 1003.

29. **Estoppel**—Effect of.—Titles by estoppel, not of record, have no effect, except between the parties.—Brewer v. Wright, La., 58 So. 160.

30. **Evidence**—Book Entries.—Book entries as to loads of ashes delivered to defendant were inadmissible, where they were made on reports of a driver who was not produced.—Galway & Co. v. Prignano, 134 N. Y. Supp. 571.

31.——Foreign Law.—A practicing lawyer who had practiced and held judicial offices in Germany held competent to testify as an expert to the maritime law of that country.—Manchester Liners v. Virginia-Carolina Chemical Co., U. S. D. C., 194 Fed. 463.

32.——Judicial Notice.—Provisions of the acts of Congress of February 20, 1811, April 8, 1812, March 1, 1817 and March 6, 1820, and ordinance for Northwest Territory as to Mississippi river and tributaries, held judicially noticed by Supreme Court.—Hurst v. Davis, Kan., 122 Pac. 1041.

33.——Presumption.—A lighted lantern placed at the end of a pile of sand in a street early in the evening is presumed to have continued burning until the contrary was shown.—Carlson v. City of New York, 134 N. Y. Supp. 661.

34.——Suicide.—There is a presumption against suicide although it may be rebutted by mere preponderance of evidence.—Norman v. Order of United Commercial Travelers of America, Mo., 145 S. W. 853.

35. **Exemptions**—Wages.—Wages of a gatekeeper at a railway depot are exempt from process of garnishment as wages of a laborer, though as part of his duties he occasionally reported infractions of the law about the depot and caused arrests to be made.—Central of Georgia Ry. Co. v. Chas. Wachtel's Son, Ga., 74 S. E. 713.

36. **False Pretenses**—Elements of.—A representation, though false and fraudulent, and made with intent to cheat and defraud, does not constitute a statutory offense of swindling, unless the person to whom it was made was in fact cheated thereby.—Albert v. State, Ga., 74 S. E. 714.

37. **Fraud**—Damages.—Honest belief of party making fraudulent representations as to property does not relieve him from liability for damages therefor.—Godfrey v. Olson, Wash., 122 Pac. 1014.

38.——Suppression of Truth.—One under duty to give information, who makes erroneous statement without knowledge on the subject, is liable in law as if he had intentionally stated a falsehood.—James v. Piggott, W. Va., 74 S. E. 667.

39. **Fraudulent Conveyances**—Impeachment by Grantor.—A husband could not impeach the validity of a deed by him to his wife by mere proof that he executed it to defraud creditors.—Brantley v. Brantley, Tex., 145 S. W. 1024.

40. **Frauds, Statute of**—Evidence.—A contract, binding under the statute of frauds, may be made through letters, writings, and telegrams so related to the subject-matter and connected with each other that they may fairly be said to constitute one paper.—Atwood v. Rose, Okla., 122 Pac. 929.

41.——Lease.—A tenant may recover the reasonable value of services performed for his landlord under a lease void under the statute of frauds.—Winter v. Spradling, Mo., 145 S. W. 834.

42.——Real Estate.—Real estate may be shown to have become partnership property, without any writing or memorandum, under the statute of frauds.—Sarbach v. Sarbach, Kan., 122 Pac. 1052.

43. **Gaming**—Reputation.—The character of a place as a gambling house is established by proof that it bore that reputation, and that visitors were gamblers.—Christison v. State, Ind., 98 N. E. 113.

44. **Garnishment**—Debts Subject To.—Where, after services of garnishment upon a lessee of

defendant, but before answer, rent accrues, the defendant cannot defeat the garnishment by assignment of the rent.—Loomis v. Shriner, Mo., 145 S. W. 865.

45. **Gas**—Explosion.—A letter from the mayor to the superintendent of a natural gas company, calling attention to recent explosions and requesting repairs to prevent further damage, is competent on the question of notice to the company in an action relating to an explosion soon afterwards.—Luengene v. Consumers' Light, Heat & Power Co., Kan., 122 Pac. 1032.

46. **Husband and Wife**—Community Property.—Where a customer was injured by the negligence of a husband in operating a store belonging to the community of himself and wife, the damages recovered against the husband constituted a community debt.—Woste v. Rugge, Wash., 122 Pac. 988.

47.——Estoppel.—Where a wife, authorized by her husband, directs counsel to file petition that she and her coheirs be put into possession of certain property of the estate of their father and grandfather, she cannot afterwards say that she owned the entire property.—Priestly v. Chapman, La., 58 So. 156.

48. **Indemnity**—Joint Tortfeasors.—While ordinarily joint tort-feasors have no right to reimbursement, a city mulcted in damages because of an injury, caused by a defective grating in a sidewalk maintained by an abutting property owner, may recover over against such owner.—Kilroy v. City of St. Louis, Mo., 145 S. W. 769.

49.——Notice to Indemnitor.—Where a person is responsible over to another by operation of law or by express contract, and he is fully informed of the claim and that the action is pending and has full opportunity to defend, the judgment, if obtained without fraud or collusion, will be conclusive against him.—Burley v. Compagnie de Navigation Francaise, C. C. A., 194 Fed. 335.

50. **Indictment and Information**—Accessory.—An indictment of one as accessory before the fact to a felony must allege the commission of the felony by the principal with the same degree of certainty as though the principal were alone indicted.—Ray v. State, Ark., 145 S. W. 881.

51.——Seduction.—Under an indictment for seduction under promise of marriage, accused may be convicted of fornication, if the evidence shows, though it be not affirmatively alleged in the indictment, that he was a single man.—Boggs v. State, Ga., 74 S. E. 716.

52. **Insolvency**—Evidence.—Bad faith of the principal in other particular transactions is not evidence of his insolvency so as to charge a guarantor.—Texas Baptist University v. Patton, Tex., 145 S. W. 1063.

53. **Insurance**—Fraternal Benefit.—A member of a fraternal benefit association may direct the beneficiary to distribute fund in accordance with will.—Katz v. Witt, 134 N. Y. Supp. 675.

54.——Proofs of Death.—Where a fraternal accident insurance association denied all liability for an accident which caused the death of the insured, it thereby waived proofs of death and the benefit of a provision giving a stipulated time in which to make payment.—Norman v. Order of United Commercial Travelers of America, Mo., 145 S. W. 853.

55.——Waiver.—Where an insurer knew that an insured was engaged in the sale of malt liquors as a beverage, so as to avoid his policy under the by-laws, but received assessments from him, it thereby waived its right to avoid the certificate for that cause.—Supreme Tribe of Ben Hur v. Lennert, Ind., 98 N. E. 115.

56. **Judgment**—Collateral Attack.—To avoid a judgment, the judgment debtor attacking it in a collateral proceeding has the burden of proving that there was no valid service of process on him.—McHugh v. Conner, Wash., 122 Pac. 1018.

57.——Interest.—In a suit for damages and interest thereon, where the jury returns a general verdict for a specified sum, it is improper for the court in entering judgment to add interest thereto.—St. Louis & S. F. Ry. Co. v. Ewing, Tex., 145 S. W. 1028.

58.——Modification—It is within the discretion of the trial court to modify its decrees at any time during the term within which they were rendered.—Hall v. Dartt, Ore., 122 Pac. 898.

59.——Opening Default.—The defendant's default will not be opened and the default judgment set aside for a mistake of law on his part.—Willoburn Ranch Co. v. Yegen, Mont., 122 Pac. 915.

60. **Landlord and Tenant**—Evidence.—The continued occupation of the premises by the tenant after a fire is some evidence in an action for rent, of their fitness for occupation, though not conclusive.—Dazian v. Ittelson, 134 N. Y. Supp. 572.

61.——Merger.—An oral agreement by a landlord as to the use of an entrance is merged in a subsequent written lease, and a breach thereof is not an eviction.—American Tract Society v. Jones, 134 N. Y. Supp. 611.

62.——Nuisance.—A landlord creating or negligently suffering a nuisance on the premises cannot avoid liability to a tenant's servant injured thereby, though the tenant by reason of his own negligence could not have maintained an action for any injury suffered by himself.—Bailey v. Kelly, Kan., 122 Pac. 1027.

63.——Statute of Frauds.—The delivery of possession by a lessor under an oral lease unenforceable under the statute of frauds will constitute the lessee a tenant from year to year.—Winter v. Spradling, Mo., 145 S. W. 834.

64. **Libel and Slander**—Actionable.—A letter to the general manager of a railroad, concerning plaintiff, a general freight agent, stating that plaintiff told the writer one thing and wired an agent another, and concluding with a separate paragraph saying that plaintiff was not a reliable man in any respect, and that his word was not good, was actionable without allegation of special damage.—Allen v. Earnest, Tex., 145 S. W. 1101.

65.——Issues.—In an action for slander per se, where justification or privilege is not pleaded, the issues are as to whether plaintiff spoke the words in substance relied on by plaintiff, and, if so, what damage plaintiff sustained;

and if justification is pleaded, there is an additional issue whether the words were true.—Hamilton v. Vance, N. C., 74 S. E. 627.

66.——Mitigation.—That a libelous article was first published by another newspaper held not admissible in mitigation, unless defendant published the article as hearsay.—De Severinus v. New York Evening Journal Pub. Co., 134 N. Y. Supp. 664.

67.——Mitigation.—In libel, defendant may set up facts by way of mitigation of damages.—Schwing v. Dunlap, La., 58 So. 162.

68. **Limitation of Actions**—Amendment.—Where a cause of action in an amended pleading is distinct from that originally set up, it constitutes the bringing of a new action, and limitations run against the new cause of action to the time it was introduced.—La Floridienne, J. Buttgenbach & Co., Societe Anonyme v. Atlantic Coast Line R. Co., Fla., 58 So. 186.

69.——Discovery of Frauds.—To start limitations running against a cause of action for fraud, before its actual discovery, the plaintiff must be apprised of matters making it negligent in failing to discover the fraud.—Monmouth College v. Dockery, Mo., 145 S. W. 785.

70.——Time of Essence.—Where a statute grants a right which did not exist at common law, and prescribes the time within which it must be exercised, the limitation is of the essence of the right.—Dolenty v. Broadwater County, Mont., 122 Pac. 919.

71. **Logs and Logging**—License.—A purchaser of standing timber with the right to erect on the land a mill to saw the timber who paid the price and entered on the land and cut and sawed timber acquired at least an irrevocable license within the protection of equity.—Young v. Waggoner, Ind., 98 N. E. 145.

72. **Malicious Prosecution**—Advice of Attorney.—The advice of an attorney for defendant, who was in possession of all material facts known to him, that on those facts plaintiff was guilty of a criminal offense, is conclusive in favor of defendant on the question of probable cause, in an action for malicious prosecution.—Henderson v. McGruder, Ind., 98 N. E. 137.

73. **Mandamus**—Beneficial Association.—The writ of mandate will not issue to compel reinstatement of a member of a beneficial association whose expulsion was merely irregular, where its issuance would be useless because she could be regularly expelled.—Neto v. Conselho Amor Da Sociedade 41, Cal., 122 Pac. 973.

74.——Superintending Control.—The Court of Criminal Appeals may issue mandamus to compel the trial court to enter a notice of appeal, where the trial court willfully or inadvertently fails to enter such notice, or, through force or fear, accused is prevented from giving it.—Ex parte Martinez, Tex., 145 S. W. 959.

75. **Master and Servant**—Injuries.—In action by fireman for injuries caused from an explosion of a fire box in a locomotive from water coming suddenly into the fire box, the doctrine of res ipsa loquitur applies.—Marceau v. Rutland R. Co., 134 N. Y. Supp. 594.

76.——Instructions.—In an action for injuries to an employee occurring after the statute of 1909, an instruction making contributory negligence a complete defense was properly refused.—Galveston, H. & S. A. Ry. Co. v. Sample, Tex., 145 S. W. 1057.

77.——Mere Accident.—An injury to a carpenter engaged in making repairs in stock pens, caused by stumbling over a nail left protruding in removing old flooring, is a mere accident for which the employer is not liable.—West v. Cudahy Packing Co., Kan., 122 Pac. 1024.

78.——Pleading.—Where the petition, in an action for a servant's death alleged particular acts of negligence, held, that plaintiff could not rely on the res ipsa loquitur doctrine, but must prove one of the negligent acts alleged.—Capehardt v. Murta, Mo., 145 S. W. 827.

79. **Mines and Minerals**—Rule of Property.—A rule governing the right of persons as associates locating on mineral lands as a consolidated claim to convey a part thereof before discovery held a rule of property from which departure should not be made.—Merced Oil Mining Co. v. Patterson, Cal., 122 Pac. 950.

80. **Money Received**—Action for.—A common count for money had and received is applicable in all cases where the defendant has obtained money which ex aequo et bono he ought to refund.—Cullen v. Seaboard Air Line R. Co., Fla., 58 So. 182.

81. **Municipal Corporations**—Change of Grade.—If municipality lays out streets on natural grade, it becomes liable to lot owners for injury from a subsequent change in the grade line.—Rutherford v. City of Williamson, W. Va., 74 S. E. 682.

82.——Liability.—A municipality is not liable for the acts of such of its officers as have no authority in the premises.—Rutherford v. City of Williamson, W. Va., 74 S. E. 682.

83.——Pedestrian.—A pedestrian on a sidewalk may assume the safety of the sidewalk, and need not give any attention to his steps until in some manner warned of danger.—Moser v. Legniti, 134 N. Y. Supp. 606.

84. **Navigable Waters**—Bed of Stream.—If title to the bed of a stream was in the state when land bordering it was granted to a patentee, it remains in the state, regardless of subsequent navigation or navigability.—Hurst v. Dana, Kan., 122 Pac. 1041.

85. **Negligence**—Sure to Child.—The piling of lumber in an exposed situation and easily accessible to children of tender years constitutes actionable negligence.—Underwood v. St. Louis & S. F. R. Co., C. C. A., 194 Fed. 363.

86.——Manufacturer.—Where a manufacturer or assembler of an automobile places the same on the market, knowing, or under circumstances charging him with knowledge, that it is dangerous and defective, he becomes liable to a purchaser injured, while using the machine, by reason of the defect.—Johnson v. Cadillac Motor Car Co., U. S. C. C., 194 Fed. 497.

87.——Obvious Danger.—Exposing oneself to known danger will preclude a recovery for resulting injury only when the danger is so obvious and imminent that a person of ordinary prudence under like circumstances would not subject himself to it.—Louisville Gas Co. v. Fry, Ky., 145 S. W. 748.

88.——Voluntary Exposure.—The doctrine of assumption of risk is based on voluntary ex-

posure to a known danger, and can be applied only where a person may reasonably elect whether or not he shall expose himself to it.—Chicago, R. I. & P. Ry. Co. v. Lewis, Ark., 145 S. W. 898.

89. **Partnership**—Holding Out.—Where one procures an extension of credit to a partnership of which he holds himself out as a member, he is estopped to deny the relation and set up nonliability for the debt.—Mitchell v. R. J. Craig & Co., Ga., 74 S. E. 716.

90.——Notice.—One making a payment to a partner without notice that the partner obtaining it intends to use it for a purpose of his own is entitled to credit for the payment as against the firm.—Mosby v. U. S., C. C. A., 194 Fed. 346.

91.——Realty.—Realty purchased with partnership funds for partnership purposes, though deeded to individuals, is partnership property, and is treated as personalty.—Scott v. Dixie Fire Ins. Co., W. Va., 74 S. E. 659.

92. **Partition**—Divisibility in Kind.—A sale of property to effect a partition could not be ordered without proof of its indivisibility in kind.—Trahan v. Wilson, La., 58 So. 178.

93. **Payment**—Burden of Proof.—On the trial of a case, where an indebtedness has been established, the burden of proving payment is on the debtor.—West Pub. Co. v. Corbett, Mo., 145 S. W. 868.

94.——Burden of Proof.—Where the proof of payment is in the exclusive knowledge and control of the plaintiff, the burden of producing the evidence is on him.—Schneider v. Maney, Mo., 145 S. W. 823.

95. **Principal and Agent**—Apparent Authority.—A third person may recover from a principal on a contract by an agent on proof of apparent authority sufficient to include the act in question.—Union Bank & Trust Co. v. Long Pole Lumber Co., W. Va., 74 S. E. 674.

96.——Undisclosed Principal.—The liability on a contract made by an agent of an undisclosed principal is to the other person to the contract, and not to his principal.—Hale v. Triest, 134 N. Y. Supp. 673.

97. **Quieting Title**—Removing Cloud.—A suit will lie to remove a cloud made by a claim under a deed of trust, though such claim be void on its face.—Degetau v. Mayer, Tex., 145 S. W. 1054.

98. **Railroads**—Street Crossing.—An engineer in charge of a train stopped on a street crossing was not required to give warning when he moved the cars.—Cherry v. St. Louis & S. F. R. Co., Mo., 145 S. W. 837.

99.——Warning.—The failure of a railroad to warn a servant of a consignee, unloading a car, of a defect therein held not the cause of an injury to him, where he previously discovered the defect.—Chicago, R. I. & P. Ry. Co. v. Lewis, Ark., 145 S. W. 898.

100. **Religious Societies**—Lex Domicilia.—The legal ownership of property by a member of a religious monastic order as between himself and the society must be determined by the law of the land, and not by the canon law.—Steinhauser v. Order of St. Benedict of New Jersey, C. C. A., 194 Fed. 289.

101. **Robbery**—Overt Act.—Pushing open, and partly entering between, the swinging doors of a saloon, for the purpose and with the intent to enter and rob the inmates, is an overt act, amounting to an attempt to commit robbery, and not mere preparation.—People v. Moran, Cal., 122 Pac. 969.

102. **Sales**—Consideration.—Where the seller was already bound to pack the goods, in the quantities ordered by the buyer, a subsequent promise by the buyer to adjust or pay extra charges for packing was without consideration.—United Merchants' Press v. Corn Products Refining Co., 134 N. Y. Supp. 578.

103. **Set-off and Counterclaim**—Partnership.—Where a firm is sued on a firm note, and every member served, the right of set-off exists in favor of the individual members as against plaintiff for debts due them.—Youmans v. Moore, Ga., 74 S. E. 710.

104. **Specific Performance**—Parties.—Where a vendor contracts to convey land to a purchaser and thereafter conveys the land to a third person who has notice of the contract, the purchaser may compel the third person to specifically perform the contract.—Jordan v. Johnson, Ind., 98 N. E. 143.

105. **Taxation**—Shares of a nonresident in a joint-stock association doing business in several states are subject to transfer tax to the extent of the proportionate amount of the total assets located in the state.—In re Willmer's Estate, 134 N. Y. Supp. 686.

106. **Trespass**—Aiding and Encouraging.—Any person who is present at the commission of a trespass, encouraging or inciting the same, is liable as a principal.—Lee v. Boise Development Co., Idaho, 122 Pac. 851.

107. **Trusts**—Evidence.—To establish a parol trust to have the legacy for the use of another which equity will enforce on account of a legatee's fraud, the evidence must be clear and satisfactory.—Aumack v. Jackson, N. J., 82 Atl. 896.

108.——Parties.—An equitable owner or beneficiary in the use of real property may maintain trespass.—Noble & Carmody v. Hudson, Wyo., 122 Pac. 901.

109. **Vendor and Purchaser**—Marketable Title.—In the absence of special contract to the contrary, a purchaser may be compelled to accept a prescriptive title, which is not suggestive of any serious danger of judicial attack.—Westerfield v. Cohen, La., 58 So. 175.

110.——Notice.—A purchaser with notice from a purchaser without notice succeeds to all the rights of his grantor.—Young v. Waggoner, Ind., 98 N. E. 145.

111. **Waters and Water Courses**—Overflow.—Where surface water was discharged into a pond on land of an owner, which never overflowed, and such owner constructed drains which diverted water so as to materially increase its flow on land of an adjacent owner, he was liable, but, where the pond overflowed, and the natural course of drainage was onto the adjacent land, he was not liable.—Valentine v. Widman, Iowa, 135 N. W. 599.

112. **Wills**—Adopted Child.—An adopted child not publicly recognized is not entitled to share under the residuary clause of a will reading to "lawful heirs," where the will gave such child $100 under the designation of "my young friend."—Warden v. Overman, Iowa, 135 N. W. 649.

113.——Intention.—Where the description of realty by a will is faulty in part and describes no property owned by testatrix, and the remaining part is sufficient to indicate the realty intended to be devised, the intention of the testatrix will be enforced.—Albury v. Albury, Fla., 58 So. 190.

114.——Probate.—A will cannot take effect until it is probated by a court having jurisdiction.—Farris v. Burchard, Mo., 145 S. W. 825.

115.——Specific Legacy.—A specific legacy is not revoked by a codicil bequeathing additional legacies.—Hamilton v. Hamilton, 134 N. Y. Supp. 645.

116.——Testamentary Capacity.—That testatrix was aged and deaf and blind did not render her incapable of making a will.—In re McCabe's Will, 134 N. Y. Supp. 682.